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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1327

THE BOEING COMPANY (formerly THE BOEING AIRPLANE COMPANY), *et al.*,

Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

NORMAN WINER
Attorney for Respondents
230 Park Avenue
New York, N. Y. 10017
(212) 867-1890

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Statute Involved.

Judiciary Law of the State of New York:

§475. Attorney's lien in action, special or other proceeding.

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds

thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. L. 1909, c. 35; amended L. 1936, c. 876; L. 1938, c. 34; L. 1946, c. 105, eff. Sept. 1, 1946.

Question Presented.

In a class action certified under Rule 23(b) (1) in which the relief sought was the preservation of a fund consisting of shares of stock and the relief granted was the dollar value of that stock, are the fees of the attorneys representing the class and plaintiffs' litigation expenses to be awarded "off the top" of the fund or are they to come from a limited part of the fund only?

Statement of the Case.

A

The issue in this case is whether attorneys who bring a fund into court for the benefit of a class are to be paid by and from the entire fund or from a part of it.

Since 1881 when *Trustees* v. *Greenough,* 105 U.S. 525 (1881) was decided, the rule has been that fees and expenses of counsel were paid out of the fund "off the top" (Cf. 16a). After payment of the fees and expenses the class received the net proceeds. To the best of our knowledge, there has been no deviation from this rule whenever a common fund has been put in the control of the court.

Defendant contends that all unclaimed funds may revert to it and, therefore, if the whole fund is diminished by the payment of fees, the sum which may be returned to it would be decreased. This, it says, would violate

the American Rule in that it would be paying a part of the plaintiffs' fees. We respectfully submit, even on the very questionable assumption that the money may revert to defendant that a) such diminution would not be a payment by defendant in its capacity as defendant and b) that so long as defendant pays no more than the damages which it owes to plaintiffs, there is no infringement on the American Rule.

Defendant, in a second and partly conflicting argument, elects itself as the representative of the absent members of the class. As such, it contends that non-claimants have received no benefit and, therefore, that under *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), they should contribute no fee. We answer a) that *Alyeska* is not involved because this is a common fund and not a common benefit case and b) that if *Alyeska* were involved, the right of the absentees to claim their shares is an evident benefit (see footnotes, 11a-13a).

The Court of Appeals took *Alyeska* as its point of departure (7a). It held that this case is governed by *Greenough* (8a-10a) and "time-honored principles of the common law" (13a). It held further that this case meets the requirements for the payment of the fees of plaintiffs' attorneys by the losing defendant in class actions (9a-11a). Thus, on both grounds it decided for plaintiffs. We respectfully submit that the rulings predicated on *Alyeska* are correct but unnecessary to the case.

B

We shall restate the facts only to the extent necessary to distinguish between what is involved in this case and what is not.

On March 29, 1966, the members of the plaintiff class owned debentures of a face value of $1,544,300 which they might have converted on that day into shares of

stock with a market value of $3,289,359. Each $100 debenture was worth $316.25. But the members of the class had not seen or heard of either of two small advertisements which Boeing had inserted in *The Wall Street Journal* and which purported to terminate the conversion rights on March 29. On March 30, 1966 and thereafter, Boeing asserted that each $100 debenture was redeemable at $103.25 and that all rights to convert had expired. Thereafter, it refused all tenders for conversion and it refused to compensate plaintiffs for their loss.

The original fund in this case consisted of shares of Boeing common stock. They were set aside and reserved by Boeing as required by the indenture to be issued in return for debentures which might be tendered for conversion (Indenture, p. 39). The judgment created a fund in dollars in substitution for the shares (8a-9a). The judgment decreed that the plaintiff class "shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates" (40a). It further decreed that each member of the class who had not previously redeemed his debenture "shall be entitled to receive the sum of $316.25 for each $100 face amount of debenture" and that each member who had redeemed "shall be entitled to receive the sum of $213 for each $100 face amount of debenture"; in each case with interest (40a-41a). The individual payments were, of course, to come out of the fund.

C

Boeing says that the class members are not identifiable unless they file proofs of claim. The Court of Appeals held that the identification was sufficient under the decisions of this Court (9a-10a). It so held even though it was unaware that as of June 25, 1979, Boeing had identified the holders of the debentures or their authorized agents well enough to pay off the face amount (in redemption) of 83.3% of the debentures and the Special

Master had identified and paid off 13.1% more, for a total identification of the holders of 96.4% of the debentures held by the class. (We are informed that the Special Master will offer this proof to the Court.)

Boeing, less ardently than the dissenting opinion in the Court of Appeals, alludes to class actions as sometimes being "lawyers' suits." That is not this case. Plaintiffs, most of them as stockholders exercising rights in 1958, invested substantial sums of their money in an American corporate enterprise which they felt would grow and they have been shabbily treated. For example, two clients of the undersigned (as distinguished from class members who came to know us after our appointment as co-counsel) exercised their rights, in 1958, to purchase $20,000 and $3,000 respectively of the bonds, as an investment which, they hoped, would grow in value; they held the debentures until 1966 and the inability to convert cost them respectively $42,600 and $9,400 (before interest). They needed no stimulation from lawyers to bring action.

Boeing cites cases requiring each plaintiff in a class to prove his damages. We do not question that before receiving payment, the holder must surrender the debenture or provide proof of loss. But unquestionably there is in this case an owner of each debenture who suffered specific damage, whether he holds some of the unredeemed 3.6% or held some of the redeemed 96.4%. There is no question about the fact that every person who bought the Boeing bonds and did not convert them before March 29 lost a very specific and substantial sum of money, the amount of which is established by elementary arithmetic (5a).

The judgment is for the arithmetically computed exact damages suffered by the class and for no more. There has been no fee charged against Boeing, no "taxation of costs [fees] between party and party." The only issue

is how the "costs [fees] between solicitor and client" are to be borne. Shall the fund pay the fees and expenses of the litigation or shall the costs of the litigation for the whole class be borne by those who are here, after thirteen and a half years, to file their claims? At this time filed claims aggregate approximately 50%. (Again, the Special Master will offer a report.) As matters stand, must claimants pay twice the amount of their proper fees? Are their arithmetically proved damages to be reduced doubly because the others are not here? Boeing says "yes" and we submit that such an inequitable result cannot be right.

It should be noted that the question does not arise on an application for counsel fees made by plaintiffs or by the attorneys. It arises on an appeal from the judgment which directs that payment of the fees and expenses shall be made out of the fund.

Summary of Argument.

1. In the nearly one hundred years since *Trustees* v. *Greenough,* 105 U.S. 527 (1881), it has been uniformly held that a party (or his attorney) who brings a fund into court for the benefit of a class is entitled to receive his legal fees and disbursements out of the fund before the net proceeds are distributed to the class. The reason is that if a fund has been preserved or created for the class by the action of some members of the class, equity requires that the costs of the action be distributed ratably among those who are entitled, by the judgment, to recover their damages.

2. Beginning in 1966, in a case certified under Rule 23 (b) (1) as a class action, each and every member of the class is bound by the judgment in the action "whether favorable or unfavorable." Rule 23(c). The direction for the payment of the fee from the common fund is a binding part of the judgment obtained by the attorneys for the class.

3. The American Rule is not involved. Defendant is called upon to pay only the amount of plaintiffs' arithmetically established damages with no excess to cover plaintiffs' fees. *Greenough* established that payment out of the fund is consistent with the American Rule. On the unlikely hypothesis that the net proceeds of unclaimed shares may revert to Boeing, the difference between the net fund and the gross fund does not constitute a payment by Boeing; nor is the deduction a contribution by it in its capacity as defendant. There is no possible justification for Boeing receiving more money than the absentee would have received if he had become aware of his rights.

4. In our opinion, *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975) has made no change in the law of the "common fund." *Alyeska* was a class action without a fund. However, the requirements indicated there for non-fund cases are fully met in this case.

5. An unfair charge against plaintiffs' recovery would damage American investors, not class action attorneys; fairness to the investor demands that he pay one fee, not two.

POINT I.

The present issue was decided in *Trustees v. Greenough*, which has been followed uniformly for just under a century.

In *Greenough,* a member of a class of bondholders retrieved for the class a fund of money and property which had been improperly transferred by the trustees under the indenture. This Court held that the plaintiff was entitled to repayment of his fees and expense in the litigation. The Court held that such payment did not conflict with the American Rule but followed the established equity practice of the English courts. The Court cited

the cases in which a creditor had protected a fund for all of the debtor's creditors by initating a creditors' bill or a bankruptcy proceeding; and in which a fund established for charitable uses was protected by plaintiffs' intervention (pp. 533-4). Accordingly, it did equity by spreading the cost of the litigation among the whole class.

Professor Dawson comments:

> "The 'common fund' as originally conceived and applied by the United States Supreme Court in *Trustees* v. *Greenough* provided a just and reasonable solution. * * * Contribution in this form awarded to the litigant was entirely consistent with the broader purpose of preventing enrichment through another's loss. * * * Contribution exacted from the assets that his efforts had preserved merely distributed the loss." Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 Harv. L. Rev. 849, 849-51 (1975).

Greenough has been followed in the federal courts without exception ever since. Among the more recent cases are *Swanson* v. *American Consumer Industries,* 517 F. 2d 555 (7th Cir. 1975), in which the fund was created by a judgment and *City of Detroit* v. *Grinnell,* 495 F. 2d 448 (2nd Cir. 1974), in which the fund was created by a settlement.

The prayer for relief in this consolidated action, asked that Boeing be directed "to deliver to plaintiffs as their interests may appear in return for their debentures the securities herein described." That fund of shares had been set aside and reserved in accordance with Section 4.07 of the Indenture which was entitled *"Company to Reserve Stock."* (Also included were stock dividends which had been declared in the interim.) Plaintiffs preserved that fund and created in substitution for it a dollar fund measured precisely at the value of the shares in the fund. It is to that fund that the *"Greenough-Pettus* machinery" (Prof. Dawson's phrase) has been applied.

After *Greenough* came *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885). It followed *Greenough* and added two elements. For one, it permitted the attorney for the actor-class-member to apply directly for his fee. More important here, is that it recognized the priority of the Alabama common-law attorney's lien on the fund which the attorneys had brought into court. Thus, the equitable charge became a lien at law.

Rule 23 (to be discussed in Point II below) only reinforces the applicability of what Professor Dawson calls "the *Greenough-Pettus* machinery."

* * *

Boeing's comments on *Pettus* (its brief, p. 14) are incredible. Boeing says that this Court "did not grant attorneys' fees from the entire pool of assets recovered." We have reread and restudied the opinion of this Court and the opinion of the District Court in 3 Wood's Reports 620, and find absolutely no evidence that one iota of the property recovered was excluded from the lien granted to the attorneys. In 113 U.S. at p. 117 there is a list of the property of the railroad which certainly seems complete. At p. 119 the Court describes the decree below as directing "that the property of all kinds, belonging to the latter company * * * be sold to satisfy its debts according to priority." At p. 121 the Court says: "The prayer of the petition was * * * that they be declared to have a lien for the value of their services on all the property of that company." At p. 127 the Court said that the attorneys were "entitled to reasonable compensation" for establishing a lien "upon the property described in the suit" and that the Court below did not err "in declaring a lien upon the property in question." At no point is any part of the property distinguished from the whole by exclusion or otherwise.

Boeing proceeds to say that this phantom exclusion of property was "because under the common fund doctrine fees could only be collected from creditors 'who participated in the benefit' of the action, 113 U.S. at p. 125." The Court said no such thing; the full phrase was "participated in the benefit of their labors" and was a part of a restatement by the Court of the testimony given by one of the lawyers as to what he had said to the client. Nowhere did the Court adopt that or similar language as its own.

Boeing then says that "This Court thus held that plaintiff's attorneys' fees could only be taken from the amount of claims actually 'filed in the cause.' 113 U.S. at 127." The Court said no such thing. It said that the "calculation" of "the compensation" of the attorneys should be "made with reference to the amount of all claims filed." The purpose of that phrase was to include in calculating the fee all claims which had been filed even though they had been purchased by defendants from the original creditors and to exclude claims which had been purchased by defendants from other creditors and had not been filed.

POINT II.

Under Rule 23 the attorneys represent the whole class, the judgment is binding on the whole class and each member of the class has an interest in the fund.

On Boeing's motion this case was certified as a class action under Rule 23(b)(1). Under Rule 23(c) every member of the class, present or absent, is bound by the judgment "whether favorable or unfavorable." 3B. Moore's Federal Practice 23-466 (1978). Dawson, *supra,* 88 Harv. L. Rev. 849, 918 (1975). Gordon, *Manageability Under the Proposed Uniform Class Actions Act,* 31 S.W.L.J. 715, 717 (1977).

The District Court selected three attorneys to represent the class from among the many who had instituted actions. This effectively created an attorney-client relationship between the three and the members of the class.

The Court of Appeals wrote:

> "A certification under Rule 23(c) makes the *class* the attorneys' client for all practical purposes. *Developments in the Law: Class Actions* 89 Harv. L. Rev. 1318."

Chief Judge Mishler (Eastern District, New York) put it:

> "The point is that by granting class status, the court places the attorney for the named parties in a position of public trust and responsibility, and in effect creates an attorney-client relationship between the absentee members and the attorney." (*Cullen* v. *New York Civil Service Commission,* 435 F. Supp. 546, 560 [E.D.N.Y. 1977], app. dism. 566 F. 2d 846 [2d Cir., 1977].)

Under Rule 23(b) (1) no class member may opt out and although under Rule 23(d) (4) a motion may lie to eliminate the attorneys' "representation of absent persons" no such motion was made and no justification for such a motion is evident.

In *Pettus* the court attached the common-law attorney's lien to the entire fund even though the attorneys represented only a few of the bondholders and although only those who joined in the suit were bound by the result. Now that Rule 23 binds all members of the class and the attorney-client relation is established for the entire class, the applicability of the *"Greenough-Pettus machinery"* would seem to be beyond question.

The common-law lien recognized in *Pettus* is now statutory in New York. Section 475 of the Judiciary Law in

New York recognizes a lien on the cause of action and the judgment. The legal lien is a close kin to the equitable charge. Dawson, *"Lawyers and Involuntary Clients in Public Interest Litigation,"* 88 Harv. L. Rev. 849, 884 (1975).

POINT III.

Neither the American Rule nor common sense justifies non-contribution from absentee shares.

Greenough upholds "the power of a court of equity in cases of administration under its control, to make such allowance to the parties out of the fund as justice and equity may require" (105 U.S. at p. 535).

Attorneys for the whole class have procured a judgment for the whole class. Each member may collect his part of the judgment "on request" (12a). Is there any reason for the fee and the expense not to be spread equally; or do "justice and equity * * * require" that some pay more than their ratable share?

The argument is made that the absentee got no benefit. His right to come in and "on request" to be handed money—the maximum amount of money permissible under the American Rule—is said to be no benefit.

Boeing's theory is that, on the one hand, claiming plaintiffs should pay a bigger share of the fee if others do not appear, and that, on the other hand, the ultimate recipient of the absentee's share should receive more than the absentee would have received had the absentee collected the binding judgment obtained by his attorney. This seems neither "the justice" nor "the equity" prescribed by *Greenough*.

And if the "broader purpose of preventing enrichment through another's loss" (Dawson, *supra*, 88 Harv. L. Rev.

at p. 850) is the objective, it can surely not be served by increasing the loss of the claimants and enriching Boeing or New York State.

In essence, Boeing is advocating a "fluid charge." Certain plaintiffs' attorneys sought unsuccessfully to increase the recovery by obtaining the unclaimed funds for claiming plaintiffs—a "fluid recovery" (5a). Now Boeing seeks to decrease the recovery by charging the fees of the non-claimants against the claiming plaintiffs—a "fluid charge," varying with the number of non-claimants. One is as pernicious as the other.

POINT IV.

Alyeska is not relevant but its requirements are met in this case.

In *Alyeska*, this Court drew a line between the "common fund" cases and the "common benefit" cases (421 U.S. at p. 258). The opinion shows no intention to change the law in common fund cases. After describing *Greenough* (421 U.S. at p. 257), the Court, through Mr. Justice White, rejected any suggestion that the common fund and common benefit doctrines are the same (*id.*, at p. 258, footnote 30).

The common benefit cases have evolved as a new doctrine. In cases where plaintiffs have not preserved or produced a fund from which counsel may be paid, the issue is whether and under which circumstances the plaintiffs' fee is to be paid by a losing defendant.

Sprague v. *Ticonic National Bank*, 307 U.S. 161 (1939) was, in fact, a common fund case, as Professor Dawson points out. There was one fund there with fourteen different beneficiaries, so that payment out of the fund was perfectly consistent with *Greenough* and the American Rule. Dawson, *supra*, 88 Harv. L. Rev. 917, footnote 285.

But in cases of common benefit, where there is no fund, such as *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Hall* v. *Cole,* 412 U.S. 1 (1973), this Court has permitted costs to be taxed against both the winners and the losers when a benefit was conferred on a corporation in which all were stockholders or on all members of a union, the treasury of which belonged to winners and losers. Since all were benefited "justice and equity" were served if the non-plaintiffs shared the cost with the plaintiffs. The corporate capitalization and the union treasury were quite close to being funds.

To the extent that "common benefit" enters into this case all members of the class received the "common benefit" in the right of all to obtain their damages "on request."

If, in fact, this Court did, in *Alyeska,* intend to modify the "common fund" doctrine by adding conditions to recovery of the costs, we can add only here and there to what Chief Judge Kaufman has written. As stated above, on the matter of identification, Judge Kaufman could not have known that by June 25, 1979, Boeing and the Special Master had identified and paid off the holders of 96.4% of the debentures. If Boeing has not kept adequate follow-up information as to those class members, that should not be to the disadvantage of the class who did not have that information.

If the requirement is to prove the exact damage, or the prorating of the net fund among the debentures, that is simple (10a-11a).

If the requirement is to show a "benefit," the right to come in at any time within twenty years to claim damages is surely such (12a).

POINT V.

The American Rule is not offended.

The American Rule does not forbid a judgment which is in the exact amount of plaintiffs' damages and which leaves to plaintiffs the payment of the fees and expense of the litigation. "There is no 'surcharge' on the defeated litigant" when the deduction is "from the amount for which Boeing has *already* been held liable" (17a).

Boeing is paying nothing in its capacity as defendant; the fee comes not from it but from the absentee plaintiff. Similar situations have been presented in derivative actions. A minority stockholder recovers for the corporation a judgment against majority stockholders. From the recovery, the corporation pays a fee, thereby paying out money belonging partly to the majority stockholders and partly to the minority. But that cost is not a charge to the majority in their position as defendants; it is a cost to the corporation for increasing the equity of both majority and minority.

Hechelman v. Geyer, 252 Pa. 123, 97 A. 193 (1917);

Sant v. *Penonville Shingle Co.,* 179 Mich. 42, 146 N.W. 212 (1914).

So here, if a fee had been taken from a share paid to Boeing or to New York State, the deduction would affect the recipient as one which had fallen heir to an absentee's share, and not because it was a defendant in the case.

POINT VI.

The error in the dissenting opinion below arose because the focus was on the class action attorney rather than the American investor.

The ten-page dissenting opinion in the Court of Appeals is vehement, to say the least, in its attack on "class action lawyers". It is also vigorous in protecting plaintiffs who have not heard of the judgment from having their unclaimed shares contribute to the fees.

We find only one reference (in those ten pages) to those plaintiffs whose interests should be the heart of the case. At page 21a the dissenters say that "the lawyers advocate only their own cause and, as an incident thereto, the cause of their clients". Otherwise, plaintiffs are non-persons in the opinion.

The undersigned and his firm are not "class action lawyers". Nor do we espouse the cause of "class action lawyers". We are here because we have clients who invested their money in an American business enterprise with the hope that their investment would grow in value. It did and then Boeing attempted to deprive them of their fortunate investment.

Plaintiffs supplied Boeing with capital which it needed. The same people usually invest in other companies too. Boeing had every opportunity to give personal notice of the call to the holders (64a). Boeing, having found that the anti-dilution clause of the indenture entitled the holders to more than two shares for each $100, recomputed the conversion rate, so that by a hair's breadth it held the rate to two (78a-82a). The Court of Appeals found that the original computation was in accord with "general accounting practice" and "the economic realities" but could not find "clearly erroneous" the lower court finding that Boeing's revision of the figures was in "good faith" (81a-82a).

Boeing's purpose in all of its actions was to prevent the dilution of its share price and to prevent the loss of pennies a share in Boeing's reported earnings. There is nothing illegitimate about that when done fairly but when the holders are mistreated the whole fabric of our system is damaged.

We respectfully submit that the issue of whether plaintiffs should pay double fees to recover only what was due them does raise a policy question. But the real issue in this case is not what the attitude should be as to class action lawyers but the extent to which the courts must supply the justice which the American corporation sometimes denies its investors.

Alyeska made clear that there is a line to be drawn between "public interest" cases and "common fund" cases and even "common interest" cases such as *Mills* and *Hall*. There is no need to apply *Greenough* to every class action. The courts have had no hesitancy in applying justice according to the cases (as in "fluid recovery"). *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974) and *Lindy Brothers* v. *American Radiator etc.*, 487 F. 2d 161 (3rd Cir. 1973) make it clear that the interest of plaintiffs will be protected. In this case those interests far transcend those of the attorneys. The result of this appeal cannot increase plaintiffs' attorneys' fees (except for the services rendered on the appeal). If there were a reversal, it could affect only one of many factors determining the *quantum* of the fee. Such a result would almost certainly hurt plaintiffs substantially more than it would the attorneys.

Greenough provided the solution which was just and fair. We respectfully submit that it should be followed under Rule 23.

Conclusion.

The judgment below is just and equitable and follows the *Greenough-Pettus* doctrine which distributes the cost of preserving or producing a fund for a class.

While the facts here are well within the limitations of the common benefit cases, it is unnecessary to consider that doctrine in deciding this case.

We respectfully submit that the judgment should be affirmed.

Dated New York, New York,
July 27, 1979.

Respectfully submitted,

NORMAN WINER,
230 Park Avenue,
New York, N. Y. 10017
(212) 867-1890,

Attorney for Respondents.